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TUNG KEAN HIN & ANOR v. YUEN HENG PHONG

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
VERNON ONG LAM KIAT JCA
HASNAH MOHAMMED HASHIM JCA

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[CIVIL APPEAL NO: P-02(NCVC)(W)-1097-06-2017]
27 NOVEMBER 2018

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LAND LAW: *Transfer – Fraud – Allegation of – Whether established – Action filed more than 12 years from date of accrual of right of action – Failure to commence action upon discovery of purported fraud – Whether claim statute-barred – Whether particulars of fraud specifically pleaded – Whether non-particularisation of allegation of fraud fatal to plaintiff's case – Allegation that signature on documents forged – Whether comparison of signature made with genuine signature – Whether authorship of specimen signature sufficiently verified*

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LIMITATION: *Fraud – Discovery of fraud – Fraud discovered more than 50 years ago – Action filed more than 12 years from date of accrual of right of action – Failure to commence action upon discovery of purported fraud – Whether claim statute-barred*

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The respondent ('plaintiff') sued the appellants ('defendants'), in their capacity as the executors of the estate of the deceased, for the return of a piece of land ('the property'). The plaintiff's case was that sometime in 1960, the plaintiff mortgaged the property as security for an overdraft facility of RM5,000 to finance her soy sauce business. In 1962, the plaintiff entered into a joint venture agreement ('JVA') with the father of the deceased, who suggested that the deceased be appointed as the director of the soy sauce business. The plaintiff handed over the documents, including the title deed of the property, to the deceased. The plaintiff subsequently signed the documents, which allegedly were all in English and the contents were never explained to her, upon assurance by the deceased that they were in relation to the JVA. The deceased deposited RM5,000 into her account, which she thought was for the soy sauce business. The plaintiff stated that she was shocked when she came to know that she had in fact sold the property to the deceased and his business partner ('Tang'). By an indenture dated 3 August 1962 ('indenture'), the property was purportedly sold and transferred to the deceased and Tang and subsequently, Tang transferred his 3/14 share of the property to the deceased making the deceased the sole owner of the property. The plaintiff was told by the defendants' solicitors that if she wanted the property to be returned to her she must make monthly payment of RM130 to the deceased until the sum of RM5,000 was fully paid. Despite making the payment, the property was never transferred or returned to the plaintiff. The plaintiff's case was that she had never intended to sell the property and

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the property was fraudulently transferred by the deceased by forging her signature on the indenture. It was thus contended by the plaintiff that the transfer was defeasible pursuant to s. 340(2) of the National Land Code and by operation of law, the deceased was a constructive trustee holding the property on trust for her. The defendants, on the other hand, pleaded that the plaintiff's claim was barred by limitation and laches as the plaintiff commenced the suit more than 50 years after the execution of the indenture. The defendants further contended that the plaintiff's claim was *res judicata* as the matter had already been heard and decided in the Sessions Court Civil Suit No. 62-1283-85 filed by the deceased against the plaintiff for arrears of rental and vacant possession. After a full trial, the Sessions Court, having found that the deceased was the owner of the property, allowed the claim for vacant possession. The defendants counterclaimed against the plaintiff for, *inter alia*, an order that the private caveat lodged by the plaintiff be removed and/or set aside and that the plaintiff be prohibited from filing any/or further caveat and damages for the wrongful entry of private caveat. The High Court allowed the plaintiff's claim and dismissed the defendants' counterclaim. Hence, the appeal by the defendants. The issues for the court's determination herein were (i) whether the defendants were barred from raising *res judicata* and limitation in their defence as the defendants failed in the striking out application; (ii) whether the plaintiff's claim was time barred pursuant to the Limitation Act 1953 ('LA') and/or laches; (iii) failure of trial judge to address issue of pleading of fraud and/or forgery; and (iv) trial judge erred in law and in fact in holding that the signature was a forged signature when the expert, SP1, had admitted that he had prepared the report based on the documents given to him and not on specimen signature.

Held (allowing appeal with costs; setting aside judgment of High Court) Per Hasnah Mohammed Hashim JCA delivering the judgment of the court:

(1) The plaintiff had the knowledge of the transfer way back in 1962 but only filed a police report in 1998. No explanation was given as to the delay in lodging the police report as well as the caveat. The cause of action available to the plaintiff arose upon her discovery of the fraud. However, the action was filed more than 12 years from the date on which the right of action accrued. The failure of the plaintiff to commence any action upon the discovery of the purported fraud against the deceased rendered her claim statute-barred by the provisions of the LA. (paras 31 & 33)

(2) When fraud is relied on, it must be sufficiently alleged in the pleading to bring the case within the appropriate statutory provision. The plaintiff failed to state in her pleadings how she was kept from the knowledge of

A the transfer and the fraud, if at all. It was necessary that there must be something said or done which was the reason to keep the plaintiff from the knowledge of her right to sue. There was no affirmative act on the part of the defendants 'to deceive or lull' the plaintiff from taking any action making inquiries into the facts relevant to her right to bring an B action. The plaintiff had slept upon her rights and acquiesced for a great length of time, which was, for more than 50 years. Thus, by reason of the inordinate delay and by her own conduct, the plaintiff's claim was barred by laches. (paras 40 & 42)

(3) It is trite law that particulars of fraud must not only be pleaded, but must C be specifically pleaded so that the other party will not be taken by surprise and will know precisely the accusation against him. A general allegation of fraud is insufficient to mount the averment of fraud. The plaintiff's pleadings on the issue of forgery and/or fraud was clearly insufficient and the issue was not addressed and considered by the D Judicial Commissioner ('JC'). The non-particularisation of the allegation of fraud by the plaintiff was clearly fatal. (paras 48 & 49)

(4) The evidence by a handwriting expert could never be conclusive because it is only opinion evidence. It is trite law that the principal object of expert evidence is merely to assist court to form its own opinion. The E standard of proof in a case based on an allegation of forgery is on a balance of probabilities. Thus, the onus to prove that there was forgery laid on the plaintiff. The trial judge, based on his own observation and assessment of the plaintiff's signatures, found that the signatures were not similar, constant or consistent and that the plaintiff's signature was F forged. However, the trial judge failed to ask himself the question as to whether the plaintiff was the author of the specimen signatures provided for examination. The authorship of the plaintiff's signature was questionable as the expert himself could not ascertain whether the specimen handwriting was that of the plaintiff. (paras 53, 57, 58, 61)

G **(5)** To establish that the signature on the indenture was not of the plaintiff, comparison by necessity must be made with genuine signatures. The plaintiff's approach to establish the forgery, by making comparison with the specimen signature, purportedly given by the plaintiff before a lawyer, the authorship of which was uncertain, and the questioned H documents, was a methodology that was totally unacceptable and misguided. In the absence of verification of the authorship of the specimen signatures, the expert evidence as well as the findings of the JC were seriously flawed as they were indefensible and unsupported by the facts of the case. (paras 64-66)

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(6) The evidence showed that the plaintiff had paid RM130 to the deceased as monthly rental and receipts for the monthly rentals were issued by the deceased to the plaintiff. No evidence was adduced that the said payment was for the purchase of the property. There was no evidence of the existence of an oral or written agreement between the plaintiff and the deceased that it was agreed that the deceased would return the property to the plaintiff. Based on the facts and evidence, in absence of any proof of forgery, the JC erred in imputing or imposing a constructive trust. (paras 73 & 74)

(7) *Res judicata* did not apply. The Sessions Court in the Civil Suit No 62-1283-85 only decided on arrears of rental and vacant possession. The JC, in the striking out application did not decide on the issue of forgery as well as limitation/laches but found that there was a cause of action and for the matter to proceed to full trial to be decided on *viva voce* and documentary evidence. (para 77)

Bahasa Malaysia *Headnotes*

Responden ('plaintif') menyaman perayu-perayu ('defendan-defendan'), dalam kapasiti mereka sebagai wasi harta pusaka si mati, untuk pemulangan sebidang tanah ('hartanah'). Kes plaintif adalah, kira-kira pada 1960, plaintif menggadai janji hartanah tersebut sebagai jaminan untuk kemudahan overdraf berjumlah RM5,000 untuk membiayai perniagaan kicapnya. Pada 1962, plaintif memasuki perjanjian usahasama ('JVA') dengan bapa si mati, yang mencadangkan si mati dilantik sebagai pengarah perniagaan kicap tersebut. Plaintif menyerahkan dokumen-dokumen, termasuk hak milik hartanah, kepada si mati. Kemudian, plaintif menandatangani dokumen-dokumen, yang dikatakan dalam bahasa Inggeris dan kandungannya tidak pernah dijelaskan kepada plaintif, setelah si mati memberi jaminan bahawa kesemuanya adalah berkaitan JVA. Si mati mendepositkan RM5,000 ke dalam akaun plaintif, yang plaintif sangka adalah untuk perniagaan kicap itu. Plaintif menyatakan bahawa dia terkejut apabila mengetahui bahawa dia sebenarnya telah menjual hartanah tersebut kepada si mati dan rakan kongsinya ('Tang'). Melalui satu indentur bertarikh 3 Ogos 1962 ('indentur'), hartanah tersebut dikatakan dijual dan dipindah milik kepada si mati dan Tang dan kemudian, Tang memindah milik 3/14 syernya dalam hartanah tersebut kepada si mati menjadikan si mati pemilik mutlak hartanah tersebut. Plaintif diberitahu oleh peguam cara defendan-defendan bahawa jika dia mahukan hartanah itu dipulangkan kepadanya, dia perlu membuat bayaran bulanan RM130 kepada si mati sehingga jumlah RM5,000 dibayar sepenuhnya. Walaupun bayaran dibuat, hartanah tersebut tidak dipindah milik atau dipulangkan kepada plaintif. Kes plaintif adalah bahawa dia tidak pernah berniat menjual hartanah tersebut dan hartanah itu dipindah milik secara fraud oleh si mati dengan memalsukan tandatangannya pada indentur.

A Oleh itu, plaintif menghujahkan bahawa pindah milik itu boleh disangkal menurut s. 340(2) Kanun Tanah Negara dan bawah undang-undang, si mati adalah pemegang amanah konstruktif yang memegang hartanah tersebut dalam amanah untuk plaintif. Sebaliknya, defendan-defendan memplid bahawa tuntutan plaintif terhad masa dan kelengahan kerana plaintif
B memulakan tindakan ini lebih daripada 50 tahun selepas pemeteraian indentur. Defendan-defendan selanjutnya menghujahkan bahawa tuntutan plaintif *res judicata* kerana perkara tersebut telah pun dibicarakan dan diputuskan di Mahkamah Sesyen Guaman Sivil No. 62-1283-85 difailkan oleh si mati terhadap plaintif untuk tunggakan sewa dan milikan kosong.
C Selepas perbicaraan penuh, Mahkamah Sesyen, mendapati si mati adalah pemilik hartanah tersebut, membenarkan tuntutan milikan kosong. Defendan-defendan menuntut balas terhadap plaintif untuk, antara lain, perintah bahawa kaveat persendirian yang dimasukkan oleh plaintif dibatalkan dan/atau diketepikan dan plaintif dilarang daripada memfailkan apa-apa kaveat atau kaveat lanjut dan ganti rugi untuk kemasukan kaveat
D secara salah. Mahkamah Tinggi membenarkan tuntutan plaintif dan menolak tuntutan balas defendan-defendan. Oleh itu rayuan ini oleh defendan-defendan. Isu-isu untuk pertimbangan mahkamah di sini adalah: (i) sama ada defendan-defendan dihalang daripada membangkitkan *res judicata* dan had masa dalam pembelaan mereka kerana defendan-defendan gagal dalam
E permohonan pembatalan; (ii) sama ada tuntutan plaintif terbatas had masa berikutan Akta Had Masa 1953 ('Akta') dan/atau kelengahan; (iii) kegagalan hakim bicara mempertimbangkan isu pliding tentang fraud dan/atau penipuan; dan (iv) hakim bicara khilaf dari segi undang-undang dan fakta dalam memutuskan tandatangan tersebut adalah palsu apabila pakar, SP1,
F mengakui bahawa dia telah menyediakan laporan berdasarkan dokumen-dokumen yang diberi kepadanya dan bukan spesimen tandatangan.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan penghakiman Mahkamah Tinggi)

Oleh Hasnah Mohammed Hashim HMR menyampaikan penghakiman
G **mahkamah:**

(1) Plaintif mempunyai pengetahuan tentang pindah milik tersebut semenjak 1962 tetapi hanya membuat laporan polis pada 1998. Tiada penjelasan diberi untuk kelewatan membuat laporan polis serta memasukkan kaveat. Kausa tindakan untuk plaintif timbul selepas mengetahui tentang
H fraud tersebut. Walau bagaimanapun, tindakan difailkan lebih 12 tahun daripada tarikh kausa tindakan timbul. Kegagalan plaintif memulakan apa-apa tindakan terhadap si mati selepas mendapati fraud dilakukan menjadikan tuntutannya dilarang oleh had masa bawah peruntukan-peruntukan Akta.

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(2) Apabila bersandar pada fraud, mesti dinyatakan secukupnya dalam pliding untuk membawa kes dalam ruang lingkup peruntukan statutori yang sewajarnya. Plaintif gagal menyatakan dalam plidingnya bagaimana pindah milik dan fraud, jika ada, dirahsiakan daripada pengetahuannya. Perlu ada satu-satu perkara dinyatakan atau dibuat yang menjadi sebab untuk merahsiakan hak plaintif untuk menyaman. Tiada tindakan afirmatif oleh defendan-defendan 'untuk menipu atau melalaikan' plaintif daripada mengambil apa-apa tindakan membuat siasatan tentang fakta relevan terhadap haknya untuk mengambil tindakan. Plaintif tidak mengendahkan haknya dan menyetujui perkara tersebut untuk tempoh yang lama, iaitu, lebih daripada 50 tahun. Oleh itu, disebabkan kelewatan melampau dan melalui tindakannya sendiri, tuntutan plaintif terhad oleh kelengahan.

(3) Undang-undang adalah matan bahawa butir-butir fraud bukan hanya mesti diplid, malah mesti diplid secara spesifik agar pihak satu lagi tidak dikejutkan dan akan mengetahui secara khusus tuduhan terhadapnya. Dakwaan fraud secara am tidak mencukupi untuk mengunjurkan pernyataan fraud. Pliding plaintif atas isu penipuan dan/atau fraud jelas tidak mencukupi dan isu tersebut tidak dipertimbangkan oleh Pesuruhjaya Kehakiman ('PK'). Kegagalan memperincikan dakwaan fraud oleh plaintif jelas memudaratkan.

(4) Keterangan oleh pakar tulisan tangan bukan muktamad kerana itu hanya keterangan pendapat. Undang-undang matan bahawa tujuan utama keterangan pakar hanya untuk membantu mahkamah membentuk pendapatnya sendiri. Standard pembuktian dalam satu-satu kes berdasarkan dakwaan penipuan adalah atas imbangan kebarangkalian. Oleh itu beban membuktikan terdapatnya penipuan adalah pada plaintif. Hakim bicara, berdasarkan pemerhatian dan penilaiannya sendiri terhadap tandatangan plaintif, mendapati tandatangan-tandatangan itu tidak serupa, sekata atau konsisten dan tandatangan plaintif dipalsukan. Walau bagaimanapun, hakim bicara gagal menanya dirinya sendiri soalan sama ada plaintif adalah penulis spesimen tandatangan yang diberi untuk pemeriksaan. Penulisan tandatangan plaintif boleh dipersoalkan kerana pakar sendiri tidak dapat menentukan sama ada spesimen tandatangan itu kepunyaan plaintif.

(5) Untuk membuktikan tandatangan pada indentur bukan tandatangan plaintif, perbandingan perlu dibuat dengan tandatangan sebenar. Pendekatan plaintif untuk membuktikan penipuan dengan membuat bandingan dengan spesimen tandatangan, dikatakan diberi plaintif di hadapan peguam, yang penulisannya diragui, dan dokumen-dokumen yang dipersoalkan, adalah cara yang amat tidak boleh diterima dan

A salah. Tanpa pengesahan penulisan spesimen tandatangan, keterangan pakar dan dapatan PK jelas salah kerana tidak boleh dipertahankan dan tidak disokong fakta kes.

(6) Keterangan menunjukkan bahawa plaintif telah membayar RM130 kepada si mati sebagai sewa bulanan dan resit-resit sewa bulanan B dikeluarkan oleh si mati kepada plaintif. Tiada keterangan dikemukakan bahawa bayaran tersebut adalah untuk pembelian hartanah itu. Tiada keterangan kewujudan perjanjian lisan atau bertulis antara plaintif dan si mati bahawa ada persetujuan si mati akan memulangkan hartanah tersebut kepada plaintif. Berdasarkan fakta dan keterangan, tanpa apa- C apa bukti penipuan, PK khilaf apabila mengatakan dan mengenakan amanah konstruktif.

(7) *Res judicata* tidak terpakai. Mahkamah Sesyen dalam Guaman Sivil No 62-1283-85 hanya memutuskan tunggakan sewa dan milikan kosong. Pesuruhjaya Kehakiman, dalam permohonan pembatalan, tidak D memutuskan isu penipuan serta had masa/kelengahan tetapi mendapati terdapat kausa tindakan dan untuk perkara itu diteruskan untuk perbicaraan penuh untuk diputuskan atas keterangan *viva voce* dan dokumentar.

Case(s) referred to:

E *Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim [2009] 2 CLJ 121 CA* ***(refd)***

Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 HC ***(refd)***

Archibald v. Scully (1861) 9 HLC 360 ***(refd)***

F *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC* ***(refd)***

Associated Leisure Ltd & Ors v. Associated Newspapers Ltd [1970] 2 QB 450 ***(refd)***

Cheah Kim Tong & Anor v. Taro Kaur [1989] 2 CLJ 791; [1989] 1 CLJ (Rep) 378 HC ***(refd)***

Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***

Foo Holdings Sdn Bhd & Anor v. Foo Choon Ying @ Foo Chun Yin (Executor for the Estate G *of Chen Choi Thai, The Deceased) [2013] 1 LNS 908 HC* ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors [2000] 4 CLJ 324 CA ***(refd)***

Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Letchumanan Chettiar Alagappan (As Excutor to SL Alameloo Achi (Deceased)) & Anor H *v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC* ***(refd)***

Lindsay Petroleum Co v. Hurd (1874) LR 5 PC 221 ***(refd)***

Majuikan Sdn Bdn v. Barclays Bank PLC [2014] 9 CLJ 337 CA ***(refd)***

Malaysian Assurance Alliance Bhd v. Anthony Kulanthai Marie Joseph [2011] 1 CLJ 15 FC ***(refd)***

Murari Lal v. State of MP AIR 1980 SC 531 ***(refd)***

I *Paragon Finance Plc v. DB Thakerar & Co [1999] 1 All ER 400* ***(refd)***

PP v. Mohamed Kassim Yatim [1976] 1 LNS 105 HC ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***
Wallingford v. Mutual Society [1880] 5 App Cas 685 ***(refd)***
Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669 ***(refd)***
Wong Yew Kwan v. Wong Yu Ke & Anor [2010] 2 CLJ 703 CA ***(refd)***
Zung Zang Wood Products Sdn Bhd & Ors v. Kwan Chee Hang Sdn Bhd & Ors [2014] 2 CLJ 445 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 73
Limitation Act 1953, ss. 9(1), 10(1), 22, 29
National Land Code, s. 340(2)

Other source(s) referred to:
Halsbury's Laws of England, 5th edn, vol 68, para 948
Halsbury's Laws of Malaysia, 2006, Reissue Vol 21, para 510.041
Spencer Bower, Turner and Handley, *Actionable Misrepresentation,* 4th edn, pp 384-385

For the appellants - Tan Swee Cheng & Stephen Chua; M/s Wong & Loh
For the respondent - Lee Khai & Teh Chiew Yin; M/s Ong And Maneksha

[Editor's note: Appeal from High Court, Pulau Pinang; Civil Suit No: 22NCVC-147-10-2014 (overruled).]

Reported by S Barathi

JUDGMENT

Hasnah Mohammed Hashim JCA:

[1] This is an appeal by the appellant against the decision of the High Court dated 4 May 2017, which allowed the plaintiff's claim and dismissed the counterclaim by the defendants with costs of RM18,000.

[2] We had on 11 April 2018, after perusing the records of appeal and hearing submissions from learned counsel for the appellants ('the defendants') as well as the respondent ('the plaintiff'), unanimously allowed the appeal. We set out below our reasons.

[3] For ease of reference, in this judgment, the parties will be referred to as they were in the High Court.

Background Facts

[4] See Ngan Sang @ Lee Ngan Sang's ('the plaintiff') case against the defendants is for the return of a piece of land described as Lot 356 Mukim 16, Daerah Timur Laut, Pulau Pinang together with premises erected thereon bearing the address No. 613-E, Jalan Pasar, Air Itam, Pulau Pinang

A ('the property'). The plaintiff sued the defendants in their capacity as the executors of the estate of Tung Lung Geok ('the deceased'). The plaintiff passed away in the midst of the trial in the High Court. After the plaintiff's demise, this action was continued by her son as the administrator of her estate.

B **[5]** This case has a long history. Fifty-nine years ago in 1959, the plaintiff purchased the property from one Chan Yeok Ngoh for the sum of RM9,500. Sometime in 1960, the plaintiff applied for a license to build a soy sauce factory on the property and engaged the services of an architect, one Zainal Abidin, to draw up a building plan of the soy sauce factory. The plaintiff C mortgaged the property to Overseas Chinese Banking Corporation Ltd ('OCBC') as security for an overdraft facility of RM5,000 to finance her soy sauce business.

[6] The plaintiff then entered into a joint venture agreement to build the soy sauce factory with Tung Twa Buck, the deceased's father, who was a D close friend of the plaintiff. Tung Twa Buck suggested that his eldest son, the deceased, be appointed as the director of the soy sauce business. As the plaintiff trusted the deceased, she handed over the documents including the title deed of the property to the deceased. On 3 August 1962, the deceased requested the plaintiff to go to the office of his solicitors to execute the joint E venture agreement. The documents were all in English and according to the plaintiff the contents of the documents were never explained to her. However, she was told not to worry as the documents were in relation to the joint venture agreement. On the assurances of the deceased and his solicitor, the plaintiff signed all the documents. The deceased then took her to OCBC F and deposited RM5,000 into her account which she thought was for the soy sauce business. The plaintiff was shocked when she was notified by one Lim Tuck Seng that she had in fact sold the property to the deceased and his business partner, one Tang Theam Seng ('Tang').

[7] By an indenture dated 3 August 1962 ('the indenture'), the property G was purportedly sold and transferred to the deceased and Tang. Subsequently, Tang transferred his 3/14 share of the property to the deceased on 1 July 1963, making the deceased the sole owner of the property. The plaintiff alleged that she had gone to the defendant's solicitors' office and was told that if she wants the property to be returned to her, she must make a H monthly payment of RM130 until the sum of RM5,000 is fully paid. As her husband was unwell and the fear of the possibility that her family may be evicted from the property, she paid the RM130 per month as agreed to the deceased from 1962 to 1979. Even after diligently paying every month to the deceased there were no attempts at all to transfer and return the property to I her as promised. She subsequently realised she had paid more than the agreed sum of RM5,000. She had in fact paid the sum of RM25,000,00 to the deceased.

[8] It is the plaintiff's pleaded case that she had no intention to sell the property and that the property was fraudulently transferred by the deceased as her signature on the indenture was forged. It is contended by the plaintiff that since the property was fraudulently transferred, the said transfer is therefore defeasible pursuant to s. 340(2) of the National Land Code (NLC). Thus, by operation of law, the deceased is a constructive trustee holding the property on trust for her.

[9] Sometime in 2007, the plaintiff on the advice of the Bar Council Legal Aid Centre conducted a search at the Land Office and to her horror discovered that her signature on the indenture was forged. She lodged a police report immediately and in 2013 lodged a private caveat.

[10] The defendants, on the hand, pleaded that the plaintiff's claim is barred by limitation and laches as the plaintiff commenced this suit more than 50 years after the execution of the indenture. Furthermore, it is contended that the plaintiff's claim is *res judicata* as the matter has already been heard and decided in the Penang Sessions Court in Civil suit No: 62-1283-85.

[11] The plaintiff's claims against the defendants as summarised by the learned Judicial Commissioner in his grounds of judgment are as follows:

(i) A declaration that the signature on the indenture is the forged signature of the plaintiff;

(ii) A declaration that the indenture is null and void *ab initio* as it contains not only the plaintiff's forged signature, but also 'a false' vendor, that is one Lee Ngan Sang @ See Ngan Sang;

(iii) A declaration that the defendants hold the property on trust for the plaintiff;

(iv) A declaration that the transfer of the property to Tung Leong Geok is null and void;

(v) An order that the Registrar of Titles and all other authorities are required to carry out all necessary measures to ensure that the property is transferred back to the plaintiff's name, See Ngan Sang @ Lee Ngan, or to the personal representative or administrator of the estate of See Ngan Sang @ Lee Ngan Sang;

(vi) An order that the defendants return to the plaintiff a sum of RM20,000 for the overpayment made by the plaintiff;

(vii) Damages to be assessed and paid to the plaintiff for the difficulties, sufferings and expenses incurred as a result of the illegal transfer to Lot 356 and the false allegations;

A (viii) Interest at the rate of 5% per annum from the date of filing until full settlement;

(ix) Costs; and

(x) Any other further reliefs.

B **[12]** The defendants' counterclaims are as follows:

(a) An order that the private caveat no. 0799B2013002015 lodged by the plaintiff be removed and/or set aside with immediate effect;

(b) Further, an order that the plaintiff is prohibited from filing any/or C further caveat on Lot 356;

(c) Damages to be assessed for the wrongful entry of private caveat;

(d) Interest on damages at 5% per annum calculated on a daily rate basis form the date of filing of the counterclaim until full settlement;

D (e) Costs; and

(f) Any other further reliefs.

[13] On 16 January 2015, the defendants filed an application to strike out the plaintiff's claim. The application was dismissed by the High Court. On E appeal, the Court of Appeal dismissed the appeal and affirmed the High Court's decision. The matter was then set down for trial.

The High Court Decision

[14] Briefly, after full trial, the learned trial judge found, *inter alia*, as follows:

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(a) The learned Judicial Commissioner accepted the expert evidence of the plaintiff's expert (SP1) and concluded that the signatures of the plaintiff on the indenture were forged;

(b) That laches cannot be considered in a claim premised on forgery;

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(c) That the court is entitled to refer to the notes of evidence of the trial in the Sessions Court and concluded that based on the notes of evidence the deceased claimed to have rented the property to the plaintiff after the sale of the said property sometime in 1962. However, due to the inconsistent and conflicting evidence adduced by the parties in the H Sessions Court suit, little weight was attached to the evidence in respect of that suit.

(d) The deceased is the constructive trustee of the plaintiff when he became the registered owner of the property.

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(e) The plaintiff had proved forgery of the indenture and the title acquired by the deceased is defeasible under s. 340(2) of the NLC.

(f) The defendant is estopped from raising *res judicata* as the learned Judicial Commissioner who dismissed the striking out application had made specific findings during the interlocutory application.

The Grounds Of Appeal

[15] In their memorandum of appeal, the defendants raised, *inter alia*, the following grounds in impugning the learned Judicial Commissioner's decision:

(a) Whether the defendants are barred from raising *res judicata* and limitation in their defence as the defendants failed in the striking out application;

(b) Whether the plaintiff's claim is time barred pursuant to the Limitation Act 1953 and/or laches;

(c) The learned trial judge failed to address the issue of pleading of fraud and/or forgery. No particulars of fraud and/or forgery were pleaded in the pleadings; and

(d) The learned judge erred in law and in fact in holding that the signature is a forged signature when the expert SP1 had admitted that he had prepared the report based on the documents given to him and not on specimen signature.

Our Consideration And Decision

[16] We are mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. The general principle is that the conclusion of a trial judge is a finding of fact on the oral evidence based on the demeanour and credibility of the witnesses before him or her. Generally, such finding ought not be disturbed unless the appellate court is convinced that it is plainly wrong. It would not be sufficient to warrant any interference merely because the appellate court entertains doubt whether such finding is right (See: *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19, *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[17] The appellate court must be slow to interfere with the findings made by the trial court unless if it be shown that there was no judicial appreciation of the evidence adduced before it.

[18] Having set out the legal principles underlying appellate intervention, we now turn to the facts of the present case.

[19] It is against the historical background we mentioned above that the plaintiff's case must be viewed, and the plaintiff's case is this. She had signed the joint venture agreement in 1962. She was then told by the defendants' solicitors that if she wants the property to be returned to her she must make monthly payment of RM130 to the deceased until the sum of RM5,000 is fully paid. This she did, but the property was never transferred or returned to her. It is the plaintiff's contention that the deceased acquired the ownership of the property fraudulently as her signature on the indenture was forged.

Civil Suit No. 62-1285-85

[20] In 1985, the deceased filed a suit against the plaintiff in the Sessions Court for arrears of rental and vacant possession. The full trial commenced in 1992 and completed in 1998. After a full trial, the Sessions Court having found that the deceased is the owner of the property, allowed the claim for vacant possession.

Limitation

[21] Learned counsel for the defendants submitted that the plaintiff's claim is time barred under the Limitation Act 1953 and/or laches. The plaintiff did not commence any action in the High Court until 2014 even though she knew for more than 50 years that the property was transferred to the deceased. She had stated in her statement of claim that in 1967 she had asked the deceased to transfer the property to her after she had made the payments for five years. However, the deceased's solicitors refused to do so.

[22] By a letter dated 18 October 1978, the plaintiff, through her solicitors had reiterated that the property belongs to her:

> Our client states that the abovementioned premises belong to her and the title to that property was deposited with your client to secure her trading debt amounting to RM10,000 owing to your client. The arrangement reached was that our client could redeem the property any time provided she paid the sum of $100.00 per month as interest on the debt. Your client had, however procure a Transfer of the property in his favour …

[23] Despite sending the aforesaid notice and the failure by the deceased to return the property to her, the plaintiff did not take any steps and/or commence any action against the deceased.

[24] Yuen Heng Phong ('SP2'), the plaintiff's son and the administrator for her estate affirmed in his statutory declaration dated 28 June 2000 that his mother, the plaintiff, was fully aware that she was tricked by the deceased since 1962. However, police report was filed in 1998 in the midst of the trial in the Sessions Court. SP2 further stated in his witness statement that the plaintiff had been informed by her friend, one Lim Tuck Seng, in December 1962 that the property was sold. Yet the plaintiff did not take any action but she continued paying RM130 per month until 1979 to the deceased.

[25] It is the submission of learned counsel for the defendants that since the claim of the plaintiff is based on forgery, the recovery of land under s. 340 NLC is barred by limitation and as such any action must be commenced within 12 years from the date on which the right of action accrued. The plaintiff's cause of action would have been accrued when she realised the property was not transferred to her but to the deceased. She knew of this in 1962, in 1978, in 1985 and in 1998. For reason/s only known to the plaintiff, she did not file any action for the recovery of the property at the earliest date possible. Learned counsel finds support in that contention in the pronouncement of the Federal Court in the case of *Zung Zang Wood Products Sdn Bhd & Ors v. Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 CLJ 445; [2014] 2 MLJ 799.

[26] Learned counsel for the plaintiff, however, in response, argued that the claim of the plaintiff is based on constructive trust. The deceased had acquired the ownership of the property through the indenture which had the forged signature of the plaintiff. Therefore, by acquiring the ownership through forgery, a constructive trust is imposed in equity against the deceased. Thus, no period of limitation for recovery of the trust property by virtue of s. 22 Limitation Act 1953. Learned counsel cited the case of *Malaysian Assurance Alliance Bhd v. Anthony Kulanthai Marie Joseph* [2011] 1 CLJ 15 where it was held by the Federal Court that limitation does not apply to recovery of property based on constructive trust.

[27] Having perused the grounds of judgment of the learned Judicial Commissioner, we noted that he had not dealt with the issue of limitation in much detail. We could only venture to surmise that he had taken that approach that since the plaintiff had succeeded in establishing forgery, limitation and/or laches does not apply with in respect of our judgment, the learned Judicial Commissioner had misdirected himself in fact and in law when he concluded that laches did not apply to this case.

[28] On the facts and evidence, the plaintiff was aware of the transfer of the property by the deceased:

(i) in 1967, she had asked the deceased to transfer Lot 356 to her after she had made the payments for five years;

(ii) SP2 affirmed in his statutory declaration dated 28 June 2000 that his mother, the plaintiff, was fully aware that she was tricked by Tung Leong Geok since 1962;

(iii) SP2 had stated in his witness statement that the plaintiff had been informed by her friend, one Lim Tuck Seng, in December 1962 that Lot 356 was sold. However, the plaintiff continued paying RM130 per month until 1979;

A (iv) in 1978, her solicitors had written to the deceased on the issue of transfer of Lot 356 and that Lot 356 belongs to her;

(v) in 1985, the civil suit commenced by the defendants for arrears of rental; and

B (vi) 1998, she filed a police report of the fraudulent transfer of Lot 356.

[29] Now, s. 9(1) of the Limitation Act 1953 provides:

> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he
C claims, to that person.

[30] Section 10(1) of the same Act provides:

> Where the person bringing an action to recover land or some person through whom he claims has been in possession thereof and has, whilst entitled thereto, been dispossessed or discontinued his possession, the
D right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

[31] For recovery of property, the question that needed to be asked is when did the right of action accrued. The plaintiff's own witness, SP2, had stated
E that the plaintiff knew of the transfer way back in 1962 but only filed a police report much later in 1998 after the commencement of the 1985 suit in the Sessions Court. No explanation was given as to the delay in lodging the police report as well as the caveat. The plaintiff filed this action in 2014, more than 12 years from the date on which the right of action accrued.

F **[32]** Section 29 of the Act further provides that if the action is based upon the fraud, the period of limitation shall not begin to run until the plaintiff discovered the fraud or could with reasonable diligence have discovered the fraud:

> Where, in the case of any action for which a period of limitation is
G prescribed by this Act, either:
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
H (c) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

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[33] We observe that the cause of action available to the plaintiff arose upon her discovery of the fraud. The plaintiff had knowledge of the transfer way back in 1962. This fact was confirmed by SP2 in his statutory declaration dated 28 June 2000 as well as in his witness statement that the cause of action arose more than 50 years ago. In our judgment, the failure of the plaintiff to commence any action upon the discovery of the purported fraud against the deceased, her claim is therefore statute-barred by the provisions of the said Act.

Laches

[34] The defendants had also complained that the reliefs sought by the plaintiff could not be realised due to laches, acquiescence and delay arising from inaction by the plaintiff herself for the recovery of the property. In respect of laches, it was submitted by learned counsel for the defendants that the plaintiff filed her claim years after she knew of the transfer. All material witnesses to the transaction namely, Tung Leong Geok, Lim Tuck Seng, the deceased as well as the plaintiff have since passed away. Thus, due to the inaction by the plaintiff herself, her claim is barred not only under the Limitation Act 1953 but also due to laches.

[35] Learned counsel for the plaintiff argued that since the ownership was obtained by fraudulently means, the defendants should not be entitled to avail themselves of this equitable defence.

[36] The learned Judicial Commissioner stated in his grounds of judgment that whether or not the doctrine of laches applies is dependent on whether the defendant had acquired his title by way of fraud (See: para. [5]; p. 26 of the grounds of judgment). His Lordship then evaluated the evidence of forgery and concluded that laches cannot be applied in this case. We reproduce the trial judge's appreciation and findings on this issue:

> [70] … I undertook the comparison outlined above in relation to the key salient aspects of the Questioned Signature and the specimen signatures. Having done so, I concluded that the specimen signatures and the Questioned Signature possessed distinct and distinctive differences in their characteristics. They did not appear to have authored by the same person.
>
> [71] In my view of findings of forgery, it is my considered view that laches is not and cannot be an answer to a claim premised on forgery, more so when the forgery is proven. Forgery cannot be waived or absolved (see the case of *Maziah Musa v. Zainulabidin Mat Akhir, Dato' & Ors* [2014] 1 LNS 641).

[37] For laches to be raised, there must be delay amounting to acquiescence (See: *Cheah Kim Tong & Anor v. Taro Kaur* [1989] 2 CLJ 791; [1989] 1 CLJ (Rep) 378; [1989] 3 MLJ 252; *Foo Holdings Sdn Bhd & Anor v. Foo Choon Ying @ Foo Chun Yin (Executor for the Estate of Chen Choi Thai, The Deceased)* [2013] 1 LNS 908 HC; *Archibald v. Scully* (1861) 9 HLC 360). The doctrine of laches is based on the maxim that "equity aids the vigilant and not those who slumber on their rights." Lord Selborne succinctly explained in the landmark case of *Lindsay Petroleum Co v. Hurd* (1874) LR 5 PC 221:

> But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy.

[38] Edgar Joseph JR J in the case of *Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd* [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 explained the doctrine of laches:

> Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A Court of Equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such a delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: *14 Halsbury's Laws of England* (3rd Ed) paras 1181, 1182. Laches has been succinctly described as 'inaction with one eye's open.'

[39] The doctrine of laches is based on the Latin maxim *vigilantibus non dormientibus jura subveniunt* (the law serves the vigilant, not those who sleep). It is a defence of an equitable claim based on the length of time the plaintiff has allowed to lapse before commencing proceedings. Similarly, in the appeal before us, we are of the considered view that His Lordship erred when he failed to give due consideration to the fact that the plaintiff had slept upon her alleged rights and interest over the property, if any, and had not taken any steps upon the discovery of the alleged forgery only deciding to commence this action in 2014. No reason was given for the delay in commencing action, an inaction with one eye's open so to speak.

[40] When fraud is relied, it must be sufficiently alleged in the pleading to bring the case within the appropriate statutory provision (*Halsbury's Laws of England,* 5th edn. vol. 68. para. 948; (see also *Halsbury's Laws of Malaysia 2006,* Reissue Vol. 21 para. 510.041). The plaintiff failed to state in her pleadings how she was kept from the knowledge of the transfer and the fraud, if at all. It is necessary that there must be something said or done which was the reason to keep the plaintiff from the knowledge of her right to sue.

[41] In *Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim* [2009] 2 CLJ 121 Gopal Sri Ram JCA (as he then was), held:

> Rustomji on the *Law of Limitation and Adverse Possession* (7th Edn.), a leading work on the subject, has this comment to make (at p. 306 of the text) on the Indian equipollent of s. 18 (*viz* s. 17 of the Limitation Act 1963):
>
> There must be some affirmative act designed to prevent, and which does prevent, the discovery of the cause of action. Mere silence or passiveness (there being no fiduciary relation or act of the party calculated to deceive or lull inquiries) is not fraudulent concealment.

[42] Applying that to the present case, we find that there was no affirmative act on the part of the defendants "… to deceive or lull …" the plaintiff from taking any action making inquiries into the facts relevant to her right to bring an action. It is clear to us that the plaintiff had slept upon her rights and acquiesced for a great length of time, that is, for more than 50 years. Thus, in the light of overwhelming evidence, the plaintiff by reason of the inordinate delay and by her own conduct, in our judgment, the claim of the plaintiff is without doubt, barred by laches.

Forgery/Fraud

[43] Learned counsel for the defendants had also argued that the trial judge did not address the issue of the lack of particulars of fraud and/or forgery. The plaintiff failed to particularise the fraud or forgery in the pleadings. The plaintiff had only pleaded the issue of fraud in para. 28 of the statement of claim:

> Plaintif memplidkan bahawa Hartanah tersebut adalah diperolehi oleh Si Mati melalui penipuan dan hakmilik yang diperolehi oleh Si Mati adalah boleh disangkal di bawah Seksyen 340(2) Kanun Tanah Negara 1965.

[44] No other particulars of the alleged forgery and/or fraud were pleaded. Learned counsel submitted that allegation of forgery and/or fraud must be sufficiently particularised in the pleadings. Such allegation cannot be inferred from the facts of the case.

[45] This court in *Wong Yew Kwan v. Wong Yu Ke & Anor* [2010] 2 CLJ 703 stated the following:

A Order 18 r. 7(1) of the Rules requires a party to state the pleadings in the form of skeletal statement of facts sufficient to identify the matters complained of to enable one to establish one's case at the trial based on what is pleaded. To satisfy the rule on pleadings, the appellant was accordingly required to plead 'material facts' necessary for his defence and counterclaim. On the issue of fraud, O. 18 r. 8(1) of the Rules requires
B fraud to be specifically pleaded. There is good reason for doing so. It is so as not to take the other party by surprise. In *Associated Leisure Ltd & Ors v. Associated Newspapers Ltd* [1970] 2 QB 450 Lord Denning said:

> ... it is the duty of counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it.

C On the non-particularisation of fraud, the Federal Court in *Tan Chwee Geok v. Khaw Yen-Yen & Anor* [1975] 1 LNS 178; [1975] 2 MLJ 188, at p 191 ruled that:

> Before a plea of fraud is put on record, it is the duty of counsel to insist on being fully instructed in the matter. Such a plea should never be
D pleaded on flimsy material.

[46] Gopal Sri Ram JCA in *Wong Yew Kwan (supra)* referred to the case of *Wallingford v. Mutual Society* [1880] 5 App Cas 685 where Lord Hatherley said:

E There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and
F bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

[47] The Federal Court's case of *Zung Zang Wood products (supra)* is also of
G relevance where it states:

> In relation to pleadings in general, the rules of court require a pleading of fraud to contain particulars of the fraud on which the party pleading relies (see O. 18 r. 12(1)(a) of the Rules of the High Court 1980, now Rules of Court 2012). "When fraud is alleged it must be specifically pleaded. The mere allegation of fraud without showing facts to support
H it is not a matter to which the court will pay serious attention (*Wallingford v. Mutual Society and Official Liquidator* (1880) 5 App Cas 685 at p 697. The party need not use the word 'fraud' if he pleads, in unambiguous language, acts which amount in law to fraud (*Myddleton v. Lord Kenyon* [1794] 2 Ves 391 at p 412). Whenever fraud or misrepresentation is alleged
I in a pleading, or any affidavit, full particulars of the alleged fraud or misrepresentation must be given" (*Spencer Bower, Turner and Handley, Actionable Misrepresentation*, (4th edn), at pp. 384-385).

[48] It is trite law that particulars of fraud must not only be pleaded, but must be specifically pleaded. Fraud must be specifically pleaded so that the other party will not be taken by surprise and will know precisely the accusation against him. Lord Denning MR in *Associated Leisure Ltd & Ors v. Associated Newspapers Ltd* [1970] 2 QB 450 said that:

> it is the duty of the counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it.

[49] A general allegation of fraud is insufficient to mount the averment of fraud. In our judgment, para. 28 of the statement of claim as pleaded is clearly insufficient on the issue of forgery and/or fraud. Unfortunately, the issue of lack of particulars in the pleadings was not addressed and considered by the learned Judicial Commissioner in his grounds of judgment. The non-particularisation of the allegation of fraud by the plaintiff in this case was clearly fatal.

[50] The standard of proof for forgery is on a balance of probabilities and the burden is on the person making the assertion. The trial judge accepted and considered the expert evidence of SP1 and concluded that the specimen signatures and the questioned signatures possessed distinct and distinctive differences in their characteristics, and did not appear to have been authored by the same person.

[51] Learned counsel for the defendants submitted that the learned Judicial Commissioner erred as he failed to test the plaintiff's claim of forgery against the chronology of events and contemporaneous documents – the claim of forgery is a non-starter as the plaintiff admitted signing the indenture. On 11 October 1978, the deceased through his solicitors had written a letter to the plaintiff to inform her of an offer to sell the property at the price of RM50,000. The plaintiff in response through her solicitors had stated that her title to the property was deposited with the deceased to secure her trading debt of RM10,000 and that it was agreed that she can redeem the property at anytime provided she pays RM100 as interest on the said debt.

[52] In the present suit, it is the plaintiff's case that she had only found out of the forgery after she had conducted a search at the Land Office sometime in 2007. This was only based on SP1's evidence and not the plaintiff's herself.

[53] The plaintiff passed away on 24 December 2015. The application for a chemist report was made on 28 June 2016 by SP2. The authorship of the plaintiff's signature is questionable as the expert himself could not ascertain whether the specimen handwriting was that of the plaintiff as he did not verify or check whether the specimen handwriting was indeed by the plaintiff.

[54] No other documents were provided except for the Form 19B (the caveat) which was signed in 2007. The Pendaftar Tanah Daerah Timur Laut and the Commissioner of Oath who had affirmed the plaintiff's statutory declaration dated 28 June 2000 were not call to testify. It is further argued by learned counsel for the defendants that if the authorship of the specimen signatures could not be confirmed by anyone including SP1, the expert himself, it would be impossible to make a comparison to distinguish the authenticity of the signatures – the authorship of the specimen signatures and that of the questioned signature. The plaintiff failed to fulfil the requirement of the Evidence Act 1950 to ascertain the authorship of the specimens given to the expert. Furthermore, the expert report is only two pages giving no explanation of the method applied and the process of comparison.

[55] Learned counsel for the plaintiff submitted that 15 specimen signatures by the plaintiff were provided for comparison and examination. The specimen signatures ranged from the year 1959-2015 and the features found in the specimen signatures are consistent. It was further argued that the defendants failed to cross-examine the expert on the method and process, and that there was no challenge put to the expert that his conclusion was wrong. In view of the evidence, learned counsel for the plaintiff argued that the plaintiff has proven on the balance of probabilities that the signature on the indenture was not the signature of the plaintiff.

[56] With respect, we are unable to subscribe to the said arguments. Section 73 of the Evidence Act 1950 provides:

> (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.
>
> (2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by that person.
>
> (3) This section applies also, with any necessary modifications, to finger impressions.

[57] The evidence by a handwriting expert can never be conclusive because it is only opinion evidence. It is trite law that the principal object of expert evidence is merely to assist the court to form its own opinion. The Federal Court in the case of *Dr. Shanmuganathan v. Periasamy Sithambaram Pillai* [1997] 2 CLJ 153 referred to the Supreme Court of India's decision in the case of *Murari Lal v. State of MP* AIR 1980 SC 531, 534 where it was held that:

> ... the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher. But that is a far cry from doubting the opinion of a handwriting expert as an invariable rule and insisting upon substantial corroboration in every case, howsoever the opinion may be backed by the soundest of reasons. It is hardly fair to an expert to view his opinion with an initial suspicion and to treat him as an inferior sort of witness ... His opinion has to be tested by the acceptability of the reasons given by him. An expert deposes and not decides. His duty is "to furnish the Judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the Judge to form his own independent judgment by the application of these criteria to the facts proved in evidence."

[58] The standard of proof in a case based on an allegation of forgery is on a balance of probabilities, the authority being the Supreme Court case of *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn. Bhd.* [1993] 2 CLJ 31; [1993] 1 MLJ 182 where it was held that:

> The standard of proof required in a case of forgery on the facts of such a case as the one before the Court is not that of beyond reasonable doubt, but of a balance of probabilities.

[59] In the same case the court held that:

> The issue whether a signature on a document has been forged is a question of fact. It is eminently a matter for the trial court to determine after considering the credibility of witnesses it has seen and heard and taking into account expert evidence on the point. Of course, a trial judge is not entitled to abdicate his function by allowing an expert to determine the question … In a civil case and more so in a criminal case, the evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to his conclusion is not worth the paper on which it is written and any reliance upon such evidence would constitute a serious misdirection warranting interference by an appellate tribunal.

[60] The Federal Court in *Letchumanan Chettiar Alagappan (As Excutor to SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418 said that the onus of proof lies on the party that asserts it and not on the party that denies the allegation:

> [57] The rule is that "the onus of proof of any particular fact lies on the party who alleges it, not on him who denies it; *et incumbit probation qui decit, non qui negat, Actori incibit probation* ... The plaintiff is bound in the first instance, to show a *prima facie* case, and if he leaves it imperfect, the court will not assist him. Hence the maxim *potior est condition defendantis*. A plaintiff cannot obviously advantage himself by the weakness of the defence. A plaintiff's case must stand or fall upon the evidence adduced by him. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is bound to show a *prima facie* case at least and, if he leaves it imperfect, the court will not assist him. *Reus excipendo fit actor* (*Woodroffe and Amir Ali*, *supra*, vol. 3 at pp. 3190-3191).

A [58] "The party on whom the *onus probandi* lies ... must begin" (Woodroffe and *Amir Ali, supra*, vol. 3 at p. 3192). "The strict meaning of the term *onus probandi* is this: that if no evidence is given by the party on whom the burden is cast, the issue must be found against him" (*Woodroffe and Amir Ali, supra*, vol. 3 at p. 3189). "The principle that the party who asserts the affirmative in any controversy ought to prove his assertion, and that he
B who only denies an allegation may rest on his denial, until, at least, the probable truth of the matter asserted has been established, is one which has received the widest recognition. The reason is obvious: to all propositions, which are neither the subject of intuitive or sensitive knowledge or probabilised by experience, the mind suspends its assent until proof of them is adduced or as it has been said: 'Words are but the
C expression of fact; and therefore, when nothing can be said to be proved'; which is found is probably what is meant by the maxim *per rerum naturam, factum negantis probatio nulla est* (*Woodroffe and Amir Ali, supra*, vol. 3 at pp. 3190-3191).

[61] Thus, the onus to prove that there was forgery in this instant case lies
D on the plaintiff. The learned judge critically went through the evidence by making his own observation and assessing the signatures of the plaintiff. On appraisal, he found that the signatures were not similar, constant or consistent. In fact, the signatures were subject to variations. The finding of the trial court was that the plaintiff's signature was forged. His Lordship
E came to this conclusion based on the analysis of SP1 even though there were challenges by the defendants' counsel. The trial judge, however, failed to ask himself a very pertinent question, that is, whether the plaintiff was the author of the specimen signatures provided for examination. The authenticity of the authorship of the specimen signature purportedly by the plaintiff is of utmost
F important as the specimen signatures form the basis of the comparative analysis by SP1. Except for SP2's evidence, who could not even remember such a critical event, there were no other cogent evidence to support that the specimen signatures were in fact that of the plaintiff's.

[62] In *PP v. Mohamed Kassim Yatim* [1976] 1 LNS 105; [1977] 1 MLJ 64,
G Hashim Yeop Sani had said:

> Evidence of experts can never go beyond an opinion and can never therefore be of absolute certainly. It has always been accepted that evidence especially of handwriting can never be conclusive. But the proper way to assess the evidence in this case would be to see whether the court
H could act on such evidence if there was corroboration either by direct evidence or circumstantial evidence. It is only with such approach that a proper decision can be arrived at.

[63] We agree that a judge who is not an expert himself should defer to expert opinion unless that evidence is obviously indefensible and is not
I supported by the basic facts of the case. Where there are conflicting expert opinions, the judge is of course entitled to bring his own judicial appreciation

of the matter, and choose one over the other, but where there is only one expert opinion, he should not as a rule reject that opinion outright without judiciously considering whether it is obviously indefensible and unsupported by the basic facts of the case (See: *Majuikan Sdn Bdn v. Barclays Bank PLC* [2014] 9 CLJ 337).

[64] To establish that the signature on the indenture was not of the plaintiff, comparison by necessity must be made with genuine signatures. How better to arrive at a conclusive finding, if not by comparing the signatures on the questioned documents with the specimen signatures of the plaintiff. What is of concern in this case which the learned Judicial Commissioner overlooked is the authorship of the specimen signatures – whether the specimen signature is that of the plaintiff. The plaintiff passed away sometime in 2015 before giving evidence. SP2 testified that the specimen signatures (S14) belong to his mother and that the plaintiff had given her specimen signature before a lawyer:

> Q: Sign before whom?
>
> A: It was signed before the lawyer, and in front of me
>
> Q: When?
>
> A: Around 2015, 2014, 2015 …

[65] However, the lawyer who purportedly witnessed the plaintiff signing the specimen signature for examination was not called to testify to support SP2 contention that the signing by the plaintiff actually took place. For some unfathomable reason, this was not done. We are, therefore, satisfied that the plaintiff's approach to establish the forgery, by making comparison with S14, the authorship of which is uncertain and the questioned documents, was a methodology that was totally unacceptable and misguided.

[66] In the absence of verification of the authorship of the specimen signatures, in our judgment, the expert evidence as well as the findings of the learned Judicial Commissioner are seriously flawed as they are indefensible and unsupported by the facts of the case.

Constructive Trust

[67] In addressing the issue of constructive trust as alleged by the plaintiff, the learned Judicial Commissioner found that the deceased is the constructive trustee of the plaintiff:

> [86] On the facts of the case especially on my findings of forgery, I am satisfied that the Deceased is the constructive trustee of the Plaintiff particularly at the time when the Deceased became the registered owner of the Property …

A [87] Having regard to the above case laws, the evidence produced before me, I am of the considered view that the Plaintiff had proved the case of forgery of the Indenture dated 3.8.1962 and that the title acquired by the Deceased is therefore defeasible under section 340 (2) of the National Land Code 1965 and by operation of law, a constructive trust arises in favour of the Plaintiff and the Deceased is a constructive trustee holding
B the said Property on trust for the Plaintiff.

[68] The learned judge applied the case of *Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors* [2000] 4 CLJ 324 and concluded:

[87] … the Plaintiff had proved the case of forgery of the Indenture dated
C 3.8.1962 and that the title acquired by the Deceased is therefore defeasible under Section 340(2) of the National Land Code 1965 and by operation of law, a constructive trust arises in favour of the Plaintiff and the Deceased is a constructive trustee holding the said Property on trust for the Plaintiff …

D **[69]** Millett LJ in *Paragon Finance Plc v. DB Thakerar & Co* [1999] 1 All ER 400 summarised the principles applicable to constructive trust:

Regrettably, however, the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as
E trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.

F A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction
G by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust … In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He
H alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.

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> The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief'.

[70] In the Federal Court case of *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 Sri Ram FCJ said:

> If a trustee or other fiduciary acquires a property in breach of trust or by means of other unconscionable conduct, he or she holds it on a constructive trust for the true beneficiary.

[71] It was held by the Federal Court in *Takako Sakao, supra* at pp. 386 and 387:

> The appellant's claim – a proprietary and not merely monetary claim – against the first respondent was as a beneficiary under a constructive trust ...
>
> A constructive trust is imposed by law irrespective of the intention of the parties. It is imposed only in certain circumstances, such as where: (i) there is a specifically enforceable contract for the sale of property (movable or immovable), the vendor holds the property on a constructive trust for the purchaser; and (ii) a gift made as a *donatio mortis causa* fails, the intended beneficiary of the gift holds it in trust for the donor. What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or a part thereof.

[72] The relevant principles of trust law have been laid down in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669 by Lord Browne-Wilkinson at p. 705:

> (i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).
>
> (ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, ie, until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.

A (iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property.

B (iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

C These propositions are fundamental to the law of trusts and I would have thought uncontroversial.

[73] The evidence gleaned from the appeal records shows that the plaintiff had paid RM130 to the deceased as monthly rental and receipts for the monthly rentals were issued by the deceased to the plaintiff. No evidence was D adduced that the said payment was for the purchase of the property.

[74] There was no evidence of the existence of an oral or written agreement between the plaintiff and the deceased that it was agreed that the deceased would return the property to the plaintiff. Under the circumstances, we have E absolutely no hesitation to hold that based on the facts and evidence, in absence of any proof of forgery, the learned Judicial Commissioner erred in imputing or imposing a constructive trust.

Res Judicata

[75] Wigram, VC, in the case of *Henderson v. Henderson* [1843] 3 Hare 100 F at p. 115 explained:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising G reasonable diligence might have brought forward at the time.

[76] Peh Swee Chin FCJ delivering the judgment of the court in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 had this to say:

> H What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicature*. When a matter between two parties has been adjudicated by a Court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the

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truth; *res judicata pro veritate accipitur.* The public policy of the law is that it is in the public interest that there should be finality in litigation – interest *rei publicae ut sit finis litium.* It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.

Since a *res judicata* creates an estoppel *per rem judicatum*, the doctrine of *res judicata* is really the doctrine of estoppel *per rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say that *res judicata* is a rule of procedure and that an estoppel *per rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.

[77] Thus, guided by the aforementioned cases, we are of the view that *res judicata* does not apply for these simple reasons. The Sessions Court in Civil Suit No.62-1283-85 only decided on arrears of rental and vacant possession. The High Court in the striking out application decided whether the claim is on the face of it obviously unsustainable. The learned Judicial Commissioner in the striking out application did not decide on the issue of forgery as well as limitation/laches but he found that there is a cause of action and for the matter to proceed to full trial to be decided on *viva voce* and documentary evidence.

Conclusion

[78] In conclusion, after having heard the parties at length and upon careful perusal of the records of appeals, we are of the considered opinion that this is a case in which appellate intervention is warranted.

[79] For the foregoing reasons, we unanimously allowed the appeal in particular prayers (a) and (b) of the counterclaim with costs. We set aside the High Court judgment. As for costs, we awarded a sum of RM28,000 here and below to the appellant to be paid by the respondent subject to allocatur. We also ordered that the deposit be refunded to the appellant. So ordered.